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IN THE

Supreme Court of the United States

October Term, 1945.

No. 1065

FIRST NATIONAL BENEFIT SOCIETY, a Corporation,

Petitioner,

vs.

W. P. STUART, Collector of Internal Revenue for the District of Arizona,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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FIRST NATIONAL BENEFIT SOCIETY, a Corporation,
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vs.

W. P. STUART, Collector of Internal Revenue for the District of Arizona,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The Petition of the First National Benefit Society, an Arizona Corporation, praying the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully represents and shows:

I.

Summary Statement.

Petitioner was plaintiff in the United States District Court for the District of Arizona, and appellant in the United States Circuit Court of Appeals for the Ninth Circuit.

This case involves the validity of Federal Income Taxes and delinquency penalties assessed against petitioner for

the calendar year, 1938, in the total sum of $1914.05, which is determined by the question as to whether or not petitioner was a Life Insurance Company under the provisions of Section 201 (a) of the Internal Revenue Code. The said Section reads as follows:

> "When used in this title the term 'Life Insurance Company' means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined, life, health, and accident insurance) the reserve funds of which held for the fulfillment of such contracts comprise more than fifty percentum of its total reserve funds."

If appellant was such an insurance company during the year 1938, then under the provisions of Section 203 of said Internal Revenue Code, it would have been taxed only upon its investment income, that is, "interest, dividends, and rents" while respondent actually taxed petitioner upon its addition to its reserves.

Subsequent to the enactment of the above statute the Treasury Department Regulation 94, Articles 201 (a)-1 and 203 (a) 2-1 defined the term "reserves held for the fulfillment of such contracts" as "reserves required by state law and reserves calculated on some definite or adopted table of mortality with an interest element.

An insurance company then, in order to be taxed as a Life Insurance Company, would either have to show that these regulations were invalid or that it came within the terms of the regulations.

In a former case between these parties in the said U. S. Circuit Court of Appeals for the Ninth Circuit, Docket Number 10231 (Certiorari Denied by the Supreme Court) *First National Benefit Society v. Stuart,* 134 F. (2d) 438, the first of these contentions was made, to-wit that the

Treasury Regulations were invalid, for during the years 1936, and 1937, the years involved in the said litigation, there was no State Law requiring petitioner or similar Arizona companies to maintain any reserves. It would then have been fruitless to have made any attempt to show that appellant was within the Treasury Department Regulations during the years 1936 and 1937 for the first of these qualifications did not exist. However, during the year 1937 a law was enacted by the legislature of the State of Arizona requiring a definite amount of reserves and authorizing the Corporation Commission to supervise and require sufficient reserves. (Ch. 36 Ariz. Session Laws of 1937.)

The decision of the Circuit Court of Appeals for the Ninth Circuit above referred to (see Appendix) held that the regulations were *valid.*

Since that decision and since Certiorari was denied by this Court, three United States Circuit Courts of Appeals have held that these Regulations were *invalid.*

The Fifth Circuit.

General Life Insurance Co. v. Commissioner, 137 F. (2d) 185;

Abilene Insurance Co. v. Commissioner, 137 F. (2d) 191;

American Life Ins. Co. of Texas v. Thomas, 146 F. (2d) 434.

Tenth Circuit.

Oklahoma Benefit Life Assn. v. ....., 151 F. (2d) 505.

Eighth Circuit.

Employees of Swift & Co. v. Commissioner, 151 F. (2d) 625.

However, since during the year 1938 petitioner's business was that of issuing level premium policies of Life Insurance, and since it was, during that year, required by the laws of the State of Arizona (Sec. 609 (b) Ariz. revised code of 1928, as amended), as construed by the Arizona Supreme Court (*Pioneer Mutual Benefit Ass'n v. Corporation Commission,* 123 P. (2d) 828) to maintain reserves for the fulfilment of its life insurance contracts, and since these reserves must be calculated on a basis equivalent to the American Experience Table of mortality and 3¼ per cent [Tr. Rec. 231] petitioner was a Life Insurance Company within the meaning of these regulations.

Petitioner's contention in this action was that even if the above regulations were valid, it was a Life Insurance Company within the meaning of these regulations and that the construction placed upon them by the Commissioner was contrary to the meaning of the law itself.

Statement of Basis of Jurisdiction of Supreme Court.

The petitioner, First National Benefit Society, is a corporation organized and existing under and by virtue of the laws of the State of Arizona and maintains its principal place of business in the City of Phoenix, County of Maricopa in said State. The plaintiff is and at all times herein mentioned was operating under the provisions of the Arizona Session Laws of 1937, Ch. 36, No. 1, p. 107 (Art. 6, Ch. 53 of the 1939 Ariz. Code anno.), Sec. 607-610F, Ariz. Code, anno., as amended) and respondent, W. P. Stuart, is and at all times herein mentioned, was the duly commissioned, qualified and acting Collector of Internal Revenue of the said District of Arizona.

That in January, 1939, petitioner filed in the Office of the Collector of Internal Revenue its income tax return for the year 1938.

On or about the 26th day of April, 1940, the appellant filed with the said Collector of Internal Revenue, a protest setting forth in detail the contentions of the plaintiff [Tr. Rec. pp. 7-14] and on March 31, 1941, the Treasury Department notified appellant by mail that the said protest together with statements and conferences on November 26, 1940, and February 13, 1941, had been given careful consideration and that it had been determined that plaintiff was not a Life Insurance Company within the meaning of Section 201 of the Internal Revenue Act. That it was a Mutual Insurance Company under the provisions of Section 207 thereof.

On August 12, 1941, the defendant, W. P. Stuart, Collector of Internal Revenue, demanded in writing of and from the plaintiff, in taxes and penalties the sum of $1914.05. On the 13th day of August, 1941, and in compliance with said demand and notice of intention to seize and sell the property of petitioner, the said petitioner paid to the Collector of Internal Revenue the sum of $1914.05.

On or about the 26th day of August, 1941, petitioner filed with the Commissioner of Internal Revenue, a claim for refund covering the said year, 1938, on the form prescribed by the Commissioner, for the sum of $1914.05 [Tr. Rec. pp. 15-31]. The said claim was neither rejected nor allowed and after more than six months had elapsed since the filing of said claim, and on the 11th day of April, 1942, this action was instituted to recover the said amount from the respondent.

The Complaint set forth the above matters and the respondent answered admitting that he had classified the petitioner under the provisions of Section 207 of the Internal Revenue Act. He denied that the petitioner's reserves came within the meaning of the above mentioned

regulations and pleaded that the decision in the former litigation between the said parties (No. 10231 in Circuit Court of Appeals, 134 F. (2d) 438) which held that the regulations were valid, constituted *Res Judicata* as to this action.

The Trial Court concluded that the petitioner was not a Life Insurance Company within the meaning of Section 201 (a) of the Internal Revenue Act of 1938 and that it did not have or maintain a reserve fund within the meaning of said Section as interpreted by the Regulations, and further concluded that petitioner was not entitled to a deduction under the provisions of Section 207 (c) (3) of the Revenue Act of 1938, because the matter was *Res Adjudicata* and because the premiums received by it were not "premium deposits" within the meaning of the law and because the petitioner was not a Mutual Insurance Company other than life.

Judgment was entered on June 17, 1944 and a motion for new trial was filed on June 24th, 1944 [Tr. Rec. p. 46]. Motion for new trial was denied January 8th, 1945 [Tr. Rec. p. 264]. The decision of the Circuit Court of Appeals was filed on December 11, 1945, a Motion for new trial was filed Jan. 10, 1946, and denied on January 11, 1946.

The District Court had jurisdiction of this matter under the provisions of Section 24 (5) of the Judicial Code (28 U. S. C. A. Sec. 41-5).

The Circuit Court of Appeals had jurisdiction under Section 128 (a) of the Judicial Code (28 U. S. C. A. Sec. 225-a).

The Supreme Court of the United States has jurisdiction under Section 240 of the Judicial Code (28 U. S. C. A. 347).

The Questions Presented.

1. Whether petitioner was a Life Insurance Company during the year 1938 within the meaning of Section 201 (a) of the Internal Revenue Code.

   a. Whether Treasury Dept. Regulation 94 201 (a)-1 and 203 (a)-2-1 were valid.

   b. Whether, if the regulations were valid, the petitioner was a Life Insurance Company within the meaning of those regulations.

   c. If petitioner was an insurance company other than Life, was it entitled to a deduction under the provisions of Sec. 207 (c) (3) of the Internal Revenue Code.

Reasons Relied Upon for Issuance of the Writ.

1. There is a direct conflict between the decisions of several of the Circuit Courts of Appeal.

   A. The Circuit Court of Appeals for the Ninth Circuit has held that the regulations, construing Sec. 201(a), are valid (*First National Benefit Society v. Stuart,* 134 F. (2d) 438). While three other Circuit Courts of Appeals have held that the regulations are invalid as follows:

The Fifth Circuit.

General Life Insurance Co. v. Commissioner, 137 F. (2d) 185;

Abilene Life Ins. Co. of Texas v. Thomas, 146 F. (2d) 434.

The Tenth Circuit.

Oklahoma Benefit Life Ass'n v. ....., 151 F. (2d) 505.

The Eighth Circuit.

Employees of Swift & Co. v. Commissioner, 151 F. (2d) 625.

2. There is also a direct conflict between the said Circuit Courts of Appeals in the interpretation of the said Regulations.

3. The Classification of Mutual Benefit Societies for income tax purposes is not only in conflict in the different Circuits but that classification involves hundreds of thousands of dollars over the United States, and should be determined by this court for the sake of uniformity.

4. As the situation now stands there is a discriminatory tax being collected by the Treasury Department, as between taxpayers of the different Circuits, due to the conflicting opinions of the Courts.

5. There is also a discriminatory tax being collected as between taxpayers engaged in the same business, due to different interpretations of the meaning of the regulations.

Prayer.

Wherefore, your petitioner prays that a writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11039, *First National Benefit Society, a Corporation, Appellant v. W. P. Stuart, Collector of Internal Revenue, Appellee,* to the end that the said cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment of said Court of Appeals may be reversed by this Court, and for such other and further relief as this Court may find proper.

ROBERT R. WEAVER,
Counsel for Petitioner.

Certificate of Counsel.

I, Robert R. Weaver, counsel for Petitioner herein, hereby certify that, in my judgment, the foregoing Petition for a Writ of Certiorari, is well founded, and that it is not imposed for delay.

Witness my hand this 28th day of March, 1946.

ROBERT R. WEAVER,
Attorney for Petitioner.